Supreme Court of the United States.

October Term, 1918.

THE UNITED STATES, *Appellant,* v. CONRAD S. BABCOCK. } No. 708.

TABLE OF CASES CITED.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

FINDINGS AND JUDGMENT.

This is the claim of an officer of the United States Army for the value of a horse lost in the military service in July, 1910.

The Court of Claims found the loss of the horse as follows (rec. p. 4, Finding III):

"The Government furnished as the forage ration barley with the awns on it and the horse died of strangulation of the intestines from eating such forage at said place. The loss was without fault or negligence on the part of the plaintiff."

The word "awns" used in this finding is defined in the Century Dictionary as "a bristle-shaped terminal or dorsal appendage, such as the beard of wheat, barley and many grasses."

The Secretary of War has decided that the horse in question was reasonable, useful, necessary and proper for the officer to have had in his possession while engaged in the public service in the line of duty.

The court found the horse to be worth $200, and gave judgment in favor of the claimant for that amount (Finding VI, rec. p. 4; judgment, p. 5). From this judgment the United States appealed April 23, 1918, which appeal was allowed by the court October 21, 1918 (rec. p. 5).

STATUTES.

Revised Statutes of the United States, Sec. 3482:

"Any field, or staff, or other officer, mounted militiaman, volunteer, ranger, or cavalryman, engaged in the military service of the United States, who sustains damage without any fault or negligence on his part, while in the service, by the loss of a horse in battle, or by the loss of a horse wounded in battle, which dies of the wound, or which, being so wounded, is abandoned by order of his officer and lost, or who sustains damage by the loss of any horse by death or abandonment because of the unavoidable dangers of the sea when on board a United States transport vessel, or because

the United States fails to supply transportation for the horse, and the owner is compelled by the order of his commanding officer to embark and leave him, or in consequence of the United States failing to supply sufficient forage, or because the rider is dismounted and separated from his horse and ordered to do duty on foot at a station detached from his horse or when the officer in the immediate command orders the horse turned out to graze in the woods, prairies, or commons, because the United States fails to supply sufficient forage, and the loss is consequent thereon, or for the loss of necessary equipage, in consequence of the loss of his horse, shall be allowed and paid the value thereof, not to exceed $200." * * *

Act of June 22, 1874 (18 Stat. 193):

"An Act to Amend an act entitled 'An Act to provide for the payment of horses and other property lost or destroyed in the military service of the United States,' approved March 3, 1849.

"*Be it enacted*, etc., That the first section of the act of March 3, 1849, providing for the payment for horses and equipments lost by officers or enlisted men in the military service shall not be construed to deny payment to such officers or enlisted men for horses which may have been purchased by them in States in insurrection; and payment in any case shall not be refused where the loss resulted from any exigency or necessity of the military service, unless it was caused by the fault or negligence of such officers or enlisted men.

"Sec. 2. That no claims under said section or this amendment thereto shall be considered unless presented prior to the first day of January, 1876."

Act of March 3, 1885 (23 Stat. 350):

"An act to provide for the settlement of the claims of officers and enlisted men of the Army for loss of private property destroyed in the military service of the United States.

"*Be it enacted*, etc., That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which have been, or may hereafter be, lost or destroyed in the military service, under the following circumstances:

"First. When such loss or destruction was without fault or negligence on the part of the claimant.

"Second. Where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of any officer authorized to give such order or direct such shipment.

"Third. Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances. And the amount of such loss so ascertained and determined shall be paid out of any money in the Treasury not otherwise appropriated, and shall be in full for all such loss or damage: *Provided*, That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered: *And provided further*, That this act shall not apply to losses sustained in time of war or hostilities with Indians: *And provided further*, That the liability of the Government under this act shall be limited to such articles of personal property as the Secretary of War, in his discretion shall decide to be reasonable, useful, necessary and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty: *And provided further*, That all claims now existing shall be presented within two years and not after from the passage of this act; and all such claims hereafter arising be presented within two years from the occurrence of the loss or destruction."

II. BRIEF OF ARGUMENT.

The allowance of this claim in the court below was urged in the alternative, either under Revised Statutes, Section 3482, and its supplementary enactment of June 22, 1874; or under the act of March 3, 1885.

We will briefly submit alternative grounds of recovery under one or the other of these acts.

I. REV. STAT. SEC. 3482, AND ACT OF 1874.

Section 3482 of the Revised Statutes is a reenactment of the first section of an act approved March 3, 1849 (9 Stat. 414).

The loss of this horse is within the literal terms of Revised Statutes, sec. 3482, because the loss "was in consequence of the United States failing to supply sufficient forage." Forage of a character so injurious as to cause a fatal intestinal disease was certainly not "sufficient" in the sense of being proper or healthful food for animals. The language of the statute means sufficient good forage. The supplying of bad forage is just as much within this statute as not supplying forage at all. It can not be said that the horse had sufficient forage, when all the forage that was supplied was unfit for consumption. Grain unfit for food is not forage; it is poison.

See definition of "sufficient" in many adjudicated cases cited in "Words and Phrases," one of which is as follows:

"'Sufficient,' as defined by Webster, means adequate to suffice; equal to the end proposed; competent. *Pensacola & A. Ry. Co.* v. *State*, 5 South. 833, 835; 25 Fla. 310; 3 L. R. A. 661."

Still more clearly is this claim valid under the

amendatory act of 1874. That act was thus construed by the Court of Claims not long after its enactment, *Thomas* v. *United States* (16 C. Cls. 522, 525):

"In our opinion the meaning of this section is to give the act of 1874 the effect of amending section 3482 of the Revised Statutes, so as practically to do away with the specifications therein contained of cases in which compensation for the loss of a horse by an enlisted man may be allowed and paid, and to authorize such allowance and payment 'in *any* case where the loss resulted from *any* exigency or necessity of the military service.'"

It will hardly be denied that this case is within Revised Statutes, Sec. 3482, or its amendment of 1874.

It may, however, be contended that it is barred by the second section of the act of 1874, as not having been presented prior to the 1st day of January, 1876.

The section in question was considered by the Court of Claims in 1904, together with a separate statute of limitations enacted January 9, 1883 (22 Stat. 401). These acts were held to operate merely as statutes of limitation concerning claims in existence at the date of their passage; not as acts repealing the long-standing policy to pay for horses lost in the military service, beginning in 1796. *Hardie* v. *United States*, 39 C. Cls. 250, reaffirmed in *Cox* v. *United States*, 41 C. Cls. 86.

In the *Cox* case the horse was lost in 1898, in the *Hardie* case in 1900. The Court of Claims awarded judgments, holding that the claims were within Revised Statutes, Sec. 3482, and its amendment of June 22, 1874, and were not barred either by the second section of that act or by the limitation placed upon the presentation of claims by the act of January 9, 1883 (22 Stat. 401).

The decisions in the *Hardie* and *Cox* cases consti-

tuted the law of the Court of Claims in this class of cases for a period of twelve years. Judgments without opinions were rendered by the Court of Claims in a large number of cases extending from 1903 to 1915. These are reported in the Court of Claims reports as follows:

Francis Hunter Hardie, 38 C. Cls. 754; *George Van Horn Moseley*, 40 C. Cls. 531; *Frank W. Gruetzmacher*, 40 C. Cls. 538; *John L. Sellers, Charles B. Ewing, Charles A. Tayman, Charles E. Woodruff, William H. Bisbee*, 40 C. Cls. 548 (there erroneously listed as claims for "extra pay" but shown to be "horse lost in the military service" by official reports of "Judgments Rendered by the Court of Claims," House Document 307, 59th Congress, 1st Session, p. 2); *Gordon Johnston*, 41 C. Cls. 513; *John King Freeman, Frederick S. Young*, 41 C. Cls. 519; *Lewis S. Ryan*, 41 C. Cls. 524 (correct nature of claim shown in House Doc. 307, 59th Cong. 1st Sess. p. 2); *George K. Hunter*, 41 C. Cls. 530 (correct nature of claim shown House Doc. 859, 59th Cong. 1st Sess. p. 2); *Palmer E. Pierce*, 41 C. Cls. 531 (correct nature of claim shown House Doc. No. 859, 59th Cong. 1st Sess. p. 2); *William S. Valentine*, 41 C. Cls. 532 (correct nature of claim shown House Doc. 859, 59th Cong. 1st Sess. p. 3); *Benjamin B. Hyer, James H. McRae, Winfield S. Edgerly, Frank R. Lang, Robert E. L. Spence, William R. Molinard, Alonzo B. Coit, Frank E. Lyman, Jr., Harry H. Pattison, Carl L. Mueller, George T. Langhorne, Henry Carroll*, 41 C. Cls. 538, 539, 540 (correct nature of claims shown Senate Doc. 511, 59th Cong. 1st Sess. p. 5); *Edwin L. Martindale*, 41 C. Cls. 544 (correct nature shown House Doc. 656, 59th Cong. 2d Sess. p. 8); *Frank R. McCoy, Hugh L. Scott*, 41 C. Cls. 543 (correct nature shown

House Doc. 656, 59th Cong. 2d Sess. p. 8); *William D. Beach*, 42 C. Cls. 539; *Thomas P. Williams, Edmund L. Butts, Benjamin W. Atkinson, Henry L. Ripley, David M. Dodge, George F. Buss, George C. Geer, Harry W. Krumm, Tyree R. Rivers*, 42 C. Cls. 555 (correct nature of claims stated Senate Doc. 369, 59th Cong. 2d Sess. p. 6); *George H. Priest*, 42 C. Cls. 557 (Senate Doc. 369, 59th Cong. 2d Sess. p. 8, shows correct nature of claim); *Herbert H. Sargent*, 42 C. Cls. 563 (correct nature of claim shown House Doc. 345, 60th Cong. 1st Sess. p. 2); *William T. Littebrant*, 43 C. Cls. 601 (correct nature of claim shown Senate Doc. 498, 60th Cong. 1st Sess. p. 2); *George H. Morgan*, 44 C. Cls. 615 (correct nature of claim shown House Doc. 437, 61st Cong. 2d Sess. p. 2); *William W. West, Jr.* 47 C. Cls. 661; *James E. Abbott*, 48 C. Cls. 520; *Samuel W. Fountain, Robert S. Woodson*, 49 C. Cls. 697; *Milton G. Holliday*, 49 C. Cls. 701; *Alfred C. Markley*, 49 C. Cls. 710; *Alexander H. Davidson*, 49 C. Cls. 714; *James W. Clendenin, Mathias Crowley, Walter S. Duggan, William R. Eastman, William M. Wright*, 50 C. Cls. 410; *Charles D. McMurdo*, 50 C. Cls. 412; *William R. Pope, Robert R. Love*, 50 C. Cls. 413; *Philip F. Harvey*, 50 C. Cls. 418. (The subject matter of some of the above claims is erroneously stated in the Court of Claims Reports, but in all such cases the description is corrected by a reference to the official report of the Secretary of the Treasury to Congress for appropriation, which description designates each of these cases as being for horse lost in the military service; the reference to the Congressional Document is given in each such case.)

As we have shown, this view as to the continued existence and force of Revised Statutes, Sec. 3482, and its amendment of 1874 was adopted by the Court

of Claims in 1904, reaffirmed in 1906, and applied up to 1915, judgments being given in sixty cases. Such a long continued judicial construction should be conclusive, especially when it is considered that every one of the judgments rendered was appealable to this court. Revised Statutes, Sec. 707, reenacted Judicial Code, Sec. 242, provides that all judgments against the United States irrespective of the amount may be carried by the United States on appeal to this court. (*United States* v. *Gleeson*, 124 U. S. 255; *Reid* v. *United States*, 211 U. S. 529; *Fritch Co.* v. *United States*, present term not yet reported.) Such a long acquiescence by the government in a ruling as to the continued force of Revised Statutes, Sec. 3482, and the act of 1874 is conclusive.

As late as 1914 the Court of Claims held that horses lost by officers in the military service were not covered by the act of March 3, 1885, governing payment for property lost in the military service of the United States for the very reason that they were within the provisions of Revised Statutes, Sec. 3482, and its amendment of 1874 providing payment for horses and equipment lost by officers in the service of the United States, *Sibley* v. *United States*, 49 C. Cls. 242, 249, 250.

Change of Ruling.

In 1916 and 1917 a series of cases involving losses of horses by Army officers in the service of the United States came before the Court of Claims and are all reported in Vol. 52 of the reports of that court.

These are *Griffis* v. *United States*, 52 C. Cls. 1; same case on motion for new trial at p. 170; and *Andrews* v. *United States*, p. 373, with which are reported others, including this one of *Babcock* at p. 385.

Each one of these opinions is by a different judge. The ruling of each opinion may be summarized as follows:

Griffis, 52 C. Cls. 1: *Holds* that Revised Statutes, Sec. 3482 and its amendment of 1874 are repealed by the expiration of the limitation of time contained in legislation of 1874, 1883 and 1888, there considered. Previous decisions of the court in the *Hardie* and *Cox* cases (39 C. Cls. 250 and 41 C. Cls. 86) are specifically considered and overruled. All the judgments rendered during the previous twelve years on the strength of these cases are held to be erroneous.

Griffis, 52 C. Cls. 170: *Holds* that while the limitation contained in the acts of 1874, 1883 and 1888 repealed the amendatory act of 1874, "section 3482 of the Revised Statutes continued in force unaffected by the act of 1874." It was also specifically decided that the act of 1885 (quoted at the opening of this brief, *ante*, pp. 3, 4) "did not apply to claims for losses of horses" (52 C. Cls. one-third down p. 198, referring to *Sibley's* case, 49 C. Cls. 242).

Andrews, 52 C. Cls. 373: *Holds*, that the act of March 3, 1885 (quoted, *ante*, pp. 3, 4,), is the law now governing claims for the losses of horses in the service and that the present claimant, Conrad S. Babcock, is entitled to recover thereunder (52 C. Cls. 385, 386).

II. ACT OF MARCH 3, 1885.

We have been insisting that this claim is allowable under Section 3482 of the Revised Statutes, which would amply justify recovery with or without the amendatory act of 1874. If, however, those acts are not in force or are not regarded as applying to this class of cases then this case is clearly within the lost

property act of 1885 (*ante*, pp. 3, 4). That act clearly includes a horse as an article of property which an officer is required to have in the military service.

The court (*Andrews* v. *United States*, 52 C. Cls. 380) states the reasons for so holding in an eminently satisfactory manner:

"The language employed in the first paragraph of the act of 1885 is decidedly comprehensive. From it alone it is not difficult to perceive a legislative intent to reimburse officers and enlisted men in the military service for the loss of *private property* lost or destroyed, under the circumstances mentioned, in said service. Obviously, it was designed to cover in toto the private property carried by the persons enumerated into the military service which was indispensable to the peculiar conditions of that particular governmental service; in other words, 'reasonable, useful, necessary, and proper for such officer or soldier while in quarters.' If we are to exclude privately owned horses from the term 'private property,' a reason must be found outside the express language of the act, for it can not be discovered within its terms if we give to the words used their ordinary, usual, and well-known significance."

The earlier decision in *Sibley* v. *United States*, 49 C. Cls. 242, refused allowance under this act only on the ground that the loss of horses was otherwise provided for by Sec. 3482 of the Revised Statutes and the amendment of 1874, *ante*, pp. 2, 3. If those acts did not apply to horses in time of peace, as held by the Court of Claims, then no possible reason exists for excluding horses from the purview of the act of 1885. The act of 1885, *ante*, pp. 3, 4, limits the liability of the government to such articles of personal property as the Secretary of War in his discretion shall decide to be "reasonable, useful, necessary and proper" for the officer under the circumstances. The Secretary has made such a de-

cision in this case (Finding V, Rec. p. 4), although it may be unnecessary in a proceeding in the Court of Claims or anywhere in relation to a horse which every cavalry officer is required by Army Regulations to keep (Army Regulations, 1913, paragraph 1272).

The direction of the act of 1885 "That the proper accounting officers of the Treasury" shall settle the claims does not divest the Court of Claims of jurisdiction (*Medbury* v. *United States*, 173 U. S. 492; *McLean* v. *United States*, 226 U. S. 374, 378).

STARE DECISIS.

The case before the court involves the rule of *stare decisis*. The construction given in two well considered decisions and followed in sixty cases for a period of twelve years should not be set aside and an entirely new construction adopted.

This is not a case of continued importance as a matter of administration. Congress by new legislation, enacted as a part of the Army appropriation act of July 9, 1918, Chapter VI, 40 Stat. 880, 881, has made new and different provisions for the future, retroactive to the beginning of the present war, and indefinitely prospective in regard to the loss of private property. It provides that the act of March 3, 1885 (quoted, *ante*, pp. 3, 4), shall be amended to read as follows:

"Sec. 1. That private property belonging to officers, enlisted men, and members of the Nurse Corps (female) of the Army, including all prescribed articles of equipment and clothing which they are required by law or regulations to own and use in the performance of their duties, and horses and equipment required by law or regulations to be provided by mounted officers, which since the 5th day of April, 1917, has been or shall hereafter be lost, damaged, or destroyed in the military

service shall be replaced, or the damage thereto or its value recouped to the owner as hereinafter provided, when such loss, damage, or destruction has occurred or shall hereafter occur in any of the following circumstances:"

Here follow detailed provisions as to circumstances of loss, time and manner of presenting claims, etc.

New and different provisions are thus made for the future. Distinct provision is made to reimburse officers for "horses and equipment required by law or regulations to be provided by mounted officers." The statutes which up to 1916 were construed by the Court of Claims as providing for the loss of horses in the military service of the United States should not receive a different construction as to the few cases remaining before the taking effect of the new legislation of 1918.

The judgment, whether regarded as under Revised Statutes, Sec. 3482, and its amendment of 1874, or under the act of March 3, 1885, was correct and should be affirmed.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
Attorneys for Appellee.

Supreme Court of the United States

October Term, 1918.

THE UNITED STATES,
Appellant,
v.
HERBERT B. HAYDEN.
No. 915.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

The appellee, Herbert B. Hayden, an officer of the United States Army, filed a petition in the Court of Claims August 8, 1917, claiming reimbursement for a number of articles of personal property lost by him in a destructive hurricane and flood in August, 1915, at Texas City, Texas, where he was on duty with his regiment (Record, pp. 1–4).

The claim is based on the act of March 3, 1885, (23 Stat. 350) entitled "An Act to provide for the settlement of the claims of officers and enlisted men of the Army for loss of private property destroyed in the military service of the United States." The full text of the act is contained in paragraph 4 of the petition (Record, pp. 3, 4).

Finding I (Record, p. 5) reads as follows:

"The plaintiff, Herbert B. Hayden, was at the time

covered by this claim a first lieutenant, Battery C, 4th Field Artillery, and was stationed at Texas City, Texas, on duty with his regiment.

"The camp was on low ground peculiarly exposed to inundation. August 16, 1915, a hurricane of exceptional violence and duration broke out on the coast of Texas, lasting through that day and the 17th and the 18th, driving the water from the bay up over the camp and totally wrecking and destroying all the tents as well as the wooden structures belonging to the Government. During said hurricane the plaintiff exerted himself to the utmost of his ability to save Government property, to save the lives of other officers and of their families, and to secure his own property from destruction. Notwithstanding all these efforts his tent and shack were swept away and all his personal property therein was destroyed or swept away by the waters. The loss was without fault or negligence on the part of plaintiff."

The claim was presented within two years of the loss or destruction as required by Par. 726, Army Regulations, 1913 (Finding II, first paragraph, Record, p. 5). For convenience this paragraph is here given from the Army Regulations of 1913:

"726. Compensation may be made under the provisions of the act of Congress approved March 3, 1885, for private property of officers or enlisted men lost or destroyed in the military service under any of the following circumstances:

"1. Without fault or negligence on the part of the claimant, and on account of some exigency or necessity of the military service.

"2. Where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of an officer authorized to give such order or direct such shipment.

"3. Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the sav-

ing of property belonging to the United States which was in danger at the same time and under similar circumstances.

"Compensation will not be made for losses sustained in time of war or hostilities with Indians, and claim for compensation must be presented within two years from the occurrence of the loss or destruction. Each claim for compensation will be forwarded, through military channels, to the Auditor for the War Department, and will, if possible, be accompanied by the proceedings of a board of officers showing fully the circumstances of the loss. All personal property for the loss or destruction of which payment is claimed must be enumerated and described in the proceedings of the board of officers, but the board will recommend payment for only such articles as in the opinion of the board were reasonable, useful, necessary and proper for the claimant to have in the public service in the line of duty."

The Secretary of War found on the report of a board that certain articles were reasonable, useful, necessary, proper, etc., and stated the value at $333, which the court found to be the fair value of the property (Finding II, Record, pp. 5, 6).

The Court of Claims, December 16, 1918, entered judgment in favor of the claimant for $333 (Record, p. 7).

The United States appealed to this court (Record, p. 7).

II. BRIEF OF ARGUMENT.

Construction of the Act of 1885.

The circumstances of this loss bring it clearly within both the letter and the spirit of the act of 1885. That act provides compensation for the loss of private property of officers and enlisted men "under the following circumstances:"

1. When without fault or negligence on the part of the claimant.

2. Where shipped on board an unseaworthy vessel by order of any officer authorized, etc.

3. Where the loss was in consequence of the claimant having given his attention to saving property belonging to the United States.

The Comptroller of the Treasury decided in 1896,

"That it is sufficient to bring a case within any one of the clauses to give claimant the right to recover under the above cited act." *Carson's* case, 2 Comp. Dec. 644, 646, reaffirming original construction of the act in 1885, Digest Second Comptroller's Decisions, Vol. 3, p. 200, §764, and disapproving decision of 1893 to the contrary.

This view was reaffirmed in a decision of the Comptroller in 1913 (20 Comp. Dec. 238).

True, this construction was later departed from in *Gallagher's* case, 23 Comp. Dec. 627, decided May 7, 1917, referred to at the end of paragraph 3 of the petition in this case.

The Comptroller there held that the first clause providing for reimbursement when the loss was without fault or negligence was not an independent ground for reimbursement but was a qualification of the second and third clauses; and that a claim must be brought within either the second clause, providing payment where the property was shipped on an unseaworthy vessel, or under the third clause where the loss of the private property was in consequence of the claimant giving his attention to saving property belonging to the United States, in danger at the same time and under similar circumstances. To support this construction the debate in the Senate preceding the passage of the act of 1885 is given (p. 634), stars

being conveniently inserted to cover omission of a portion of the debate which shows that all claims for loss in the military service without the officer's fault or negligence were understood to be included.

Following closely upon this reversal of construction, and as if to express disapproval thereof, Congress, by a provision of general legislation in the Army appropriation act of July 9, 1918 (Chapter VI, 40 Stat. 880), enacted a complete substitute for the act of 1885, providing that private property belonging to officers, enlisted men, etc., of the Army, which since the 5th day of April, 1917, has been or shall hereafter be lost, damaged or destroyed in the military service shall be paid for "when such loss, damage, or destruction has occurred or shall hereafter occur *in any* of the following circumstances:

"First. When such loss or destruction was without fault or negligence on the part of the owner.

"Second. When such private property so lost or destroyed was shipped on board an unseaworthy vessel by order of an officer authorized to give such order or direct such shipment.

"Third. When it appears that such private property was so lost or destroyed in consequence of its owner having given his attention to the saving of property belonging to the United States which was in danger at the same time and in similar circumstances.

"Fourth. When during travel under orders the regulation allowance of baggage transferred by a common carrier is lost or damaged; but replacement or recoupment in these circumstances shall be limited to the extent of such loss or damage over and above the amount recoverable from said carrier.

"Fifth. When such private property is destroyed or captured by the enemy, or is destroyed to prevent

its falling into the hands of the enemy, or is abandoned on account of lack of transportation or by reason of military emergency requiring its abandonment, or is otherwise lost in the field during campaign."

This reenactment by Congress expressly making loss without fault or negligence a distinct ground of recovery strongly emphasizes the reasonableness of the construction of the previous act of 1885 to the same effect. That construction prevailed in the Treasury from 1885 to 1893, and again from 1896 to 1913, and was in 1918 made the statutory rule. It recognizes that a man in the military service can not choose the place to store or use his property, but must put it where the exigencies of the service require. Perhaps it may be stored as his own judgment would dictate in a substantial brick structure; perhaps military expediency as understood by his superior officers may require it to be placed in an insecure tent exposed to the violence of the elements or to hostile raids. An officer or soldier in the military service is deprived of that liberty of action which permits a citizen to safeguard his own property.

In *Purssell* v. *United States*, 46 C. Cls. 509 (1911), where an officer regularly stationed at San Francisco, was on leave of absence at the time of the earthquake and fire of April, 1906, and lost his property by the destruction of the building in which it was stored without any fault or negligence on his part, he was held entitled to recover.

In 1914 the Court of Claims on the authority of the *Purssell* case, gave judgment in favor of Lieut. Olin R. Booth, U. S. A., for personal property lost or destroyed in the military service without fault or negligence on his part and while he was giving attention to the saving of property of the United States in danger at the

same time and under similar circumstances. An appeal was taken to this court. In 1916, just as the case was about to come on for hearing, the appeal was dismissed by the Solicitor-General (*United States* v. *Booth*, No. 192, October Term, 1915; 241 U. S. 683, dismissing appeal from 49 C. Cls. 699. No opinion in either court).

These decisions were reviewed and reaffirmed in *Newcomer* v. *United States*, 51 C. Cls. 408, 511, from which no appeal was taken.

Application to this Case.

The loss of the property in this case was brought within two distinct clauses of the statute. By clause one the claim is allowable when without fault or negligence on the part of the claimant. By clause three the claim is allowable where the loss or destruction was in consequence of the claimant having given his attention to saving property belonging to the United States in danger at the same time and under similar circumstances. Either of these circumstances is sufficient to warrant a recovery. Both are found in this case to exist.

The camp was on low ground peculiarly exposed to inundation. The hurricane was exceptional in violence and duration. It totally wrecked and destroyed all the tents as well as the wooden structures belonging to the government.

The property was placed where it was by reason of the exigencies of the service. Military orders based on exigencies of the service required the officer to expose his personal property in such a situation in a tent or temporary shack. And even if liability to such damage was shared by the public generally, this does not pre-

vent it from being an accident arising out of the military service.

A similar question was before the English House of Lords in *Dennis* v. *White*, L. R. 1917 Appeal Cases, 479, a case under the workmen's compensation act, involving an accident to an employee while riding a bicycle in the streets of London in the performance of his duties. The act allows damages to be recovered for any accident arising "out of and in the course of the employment" (*Thom* v. *Sinclair*, L. R. 1917, App. Cas. 127, 132, 135). The Lord Chancellor (Lord Finlay) said (pp. 481, 482):

"The only question is whether the accident arose out of the employment. It is not disputed that the appellant was riding the bicycle in the course of his employment, and by orders of his employer. The risk of collision under such circumstances is incidental to the use of the bicycle; it is a risk inherent in the nature of the employment, and it was the cause of the accident. It follows that the accident arose out of the employment. It is quite immaterial that the risk was one which was shared by all members of the public who use bicycles for such a purpose. Such as it was, it was a risk to which the appellant was exposed in carrying out the orders of his employer.

"If a servant in the course of his master's business has to pass along the public street, whether it be on foot or on a bicycle, or on an omnibus or car, and he sustains an accident by reason of the risks incidental to the streets, the accident arises out of as well as in the course of his employment. The frequency or infrequency of the occasion on which the risk is incurred has nothing to do with the question whether an accident resulting from that risk arose out of the employment. The use of the streets by the workman merely to get to or from his work of course stands on a different footing altogether, but as soon as it is established that the work itself involves exposure to the perils of the

streets the workman can recover for any injury so occasioned. As it was put by Lord Parmoor in his judgment in *Thom* v. *Sinclair*, 1917 App. Cas. 127, 145, in this House, 'The fact that the risk may be common to all mankind does not disentitle a workman to compensation if in the particular case it arises out of the employment.'"

And with this view agreed all the other judges.

JURISDICTION OF THE COURT OF CLAIMS.

The act of 1885 opens by providing "That the proper accounting officers of the Treasury" shall settle the claims. Such a provision invests the accounting officers with no exclusive jurisdiction. On the contrary, it is their failure to give the relief provided by the act which affords occasion for the exercise of jurisdiction by the Court of Claims.

In *United States* v. *American Tobacco Company*, 166 U. S. 468, a statute provided: "The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem" stamps spoiled or destroyed. It was held that where the executive officer failed to afford the relief required by the statute the party was entitled to sue and recover in the Court of Claims.

In *Medbury* v. *United States*, 173 U. S. 492, the statute provided that in cases of erroneous entries of public land, "The Secretary of the Interior shall cause to be repaid to the person who made such entry" the fees, commissions, purchase money, etc. Where the Secretary failed to perform the duty imposed by the act the party was held entitled to a remedy in the Court of Claims.

In *Parish* v. *MacVeagh*, 214 U. S. 124, it was held (par. 3 of syllabus, p. 125):

"Under the act of February 17, 1903, c. 559, 32 Stat. L. 1612, directing the Secretary of the Treasury 'to determine and ascertain the full amount which should have been paid to Parish if the contract had been carried out in full without change or default by either party' and to issue his warrant therefor, no judicial duty devolved upon the Secretary, nor has the Secretary power to determine what was right or proper, but only the administrative duty of ascertaining the amount and paying the same; and, the amount having been ascertained, the claimant is entitled to a writ of mandamus directing the Secretary to issue his warrant therefor."

In *McLean* v. *United States*, 226 U. S. 374, where the act (top p. 377) begins, "That the proper accounting officers be, and they are hereby directed to settle and adjust" a certain claim, the court, by Mr. Justice McKenna, said, p. 378:

"The jurisdiction of the Court of Claims to entertain the action was attacked in that court and is attacked here, the contention being that the act for the relief of appellant 'constituted the accounting officers and not the courts the tribunal to settle the accounts.' The court ruled against the contention, and rightly. It is not necessary to repeat its reasoning. The duties of the accounting officers were, as the court said, administrative, not judicial, and as the rights of appellant arose under an act of Congress the court had jurisdiction to determine them. *Medbury* v. *United States*, 173 U. S. 492."

In the court below, *Nichols* v. *United States*, 7 Wall. 122, was cited as authority in favor of the exclusive jurisdiction of the accounting officers and against that of the Court of Claims. But that case was impliedly, if not expressly, overruled in *United States* v. *Emery*, 237 U. S. 28, in which the following passage of the opin-

ion (pp. 31, 32) answers the technical objections made to the maintenance of the present action:

"The jurisdiction over suits against the United States under Sec. 24, Twentieth, of the Judicial Code, extends to 'all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress.' However, gradually the result may have been approached in the earlier cases it now has become accepted law that claims like the present are 'founded upon' the revenue law. The argument that there is a distinction between claims 'arising under' (Judicial Code, Sec. 24, First) and those 'founded upon' (*id.* Sec. 24, Twentieth), a law of the United States rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye."

PROVISOS OF ACT OF 1885.

One proviso of the act of 1885 reads:

"That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered."

This language does not, any more than the opening clause of the act, confer exclusive jurisdiction on the accounting officers.

The proviso, when read with the previous portion of the act, refers to departmental action by the accounting officers. The claim in this case has not been "acted on under authority of this act." The action required by this act is that the accounting officers shall "examine into, ascertain and determine the value of the private property lost," etc. This in the present case has not been done. The Auditor for the War Department disallowed the claim, and the disallow-

ance was affirmed by the Comptroller of the Treasurer (Finding II, at end; some further particulars given in petition, Par. 3).

The claim was therefore never "acted on under authority of this act."

The further language is equally inapplicable. A claim so acted on "shall be held as finally determined, and shall never thereafter be reopened or considered."

This language applies to the tribunal by which the claim was first decided. A claim once rejected by the accounting officers, upon which suit is brought in the Court of Claims, is not "reopened." A proceeding in that court is not an appellate proceeding "reopening" the settlements of the accounting officers. It is an original and independent proceeding.

Congress has by a number of laws, the principal of which are the Dockery act, July 31, 1894, sections 3 to 25 (28 Stat. 205–211) and the Tucker act (24 Stat. 505), reenacted as Chapter VII of the Judicial Code, established two sets of tribunals for the consideration of all sorts of claims against the United States.

The first are the accounting officers, consisting of one Comptroller and six Auditors, who are administrative and not judicial officers.

The other set are the Court of Claims and District Courts having concurrent jurisdiction therewith, acting in a judicial capacity.

The general policy of legislation is that the acts of the accounting officers shall not be final, but that the courts shall be open to a party dissatisfied with their rulings. Intention should not be imputed to Congress to make an exception of the present class of cases. No reason can be suggested why the accounting officers' decisions should have a greater degree of finality in

these than in other cases. There is no reason to suppose that Congress intended to alter, with respect to this class of claims alone, the whole system established by it for the adjudication of claims against the United States.

A question almost identical was considered by this court in *United States* v. *Harmon*, 147 U. S. 268. That case involved the construction of a proviso to Section 2 of the Tucker act, "That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine * * * claims which have heretofore been rejected, or reported on adversely, by any court, department or commission authorized to hear and determine the same" (p. 272).

The court quoted with approval nearly all the opinion delivered by Mr. Justice Gray, in the Circuit Court (43 Fed. 560). After a long line of reasoning very pertinent to the present case, but too long to include here (pp. 272–276), the court quoted with approval the following (p. 276):

"We can not believe that the act of 1887, entitled 'An Act to provide for the bringing of suits against the government of the United States,' and the manifest scope and purpose of which are to extend the liability of the government to be sued, was intended to take away a jurisdiction already existing, and to give to the decisions of accounting officers an authority and effect which they never had before."

In *Hardie* v. *United States*, 39 C. Cls. 250, the Court held that a provision that certain claims shall be "forever barred, and shall not be received, considered or audited by any Department of the Government" referred to the executive departments, and had no application to the right of suit in the Court of Claims.

Another proviso of the act is "That the liability of the government under this act shall be limited to such articles of personal property as the Secretary of War, in his discretion shall decide to be reasonable, useful, necessary and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty."

Much of what has been said in regard to the previous proviso applies to this one. The decision of the Secretary of War required by this provision is one of the steps of the executive process of accounting, but is not essential to a recovery after the matter has become litigated.

In *Wisconsin Central Railroad* v. *United States*, 164 U. S. 190, 205, the court said:

"The Postmaster General in directing payment of compensation for mail transportation, under the statutes providing the rate and basis thereof, does not act judicially, and whatever the conclusiveness of executive acts so far as executive departments are concerned, as a rule of administration, it has long been settled that the action of executive officers in matters of account and payment can not be regarded as a conclusive determination when brought in question in a court of justice."

To the same effect are *United States* v. *American Tobacco Co.*, 166 U. S. 468 and *Parish* v. *MacVeagh*, 214 U. S. 124 (*ante*, pp. 9, 10).

In the *McLean* case, referred to *ante*, p. 10, the fact that the claimant was "unable to furnish the certificate required by statute to secure commutation for forage and servants' pay" was treated as no bar to a recovery (226 U. S., middle p. 383).

Still, the strictest requirement of the statute in that

respect has been met. In this case the Secretary of War has certified, following the language of the statute, "that the following articles were reasonable, useful, necessary and proper," etc. (Finding II, Record, p. 5). This is all that is required.

Conclusion.

The claimant in this case lost his property in the military service of the United States. He lost it by an overwhelming catastrophe without any fault or negligence on his part, and while he was engaged in saving the property of the United States in danger at the same time and under similar circumstances. The law clearly entitles him to be paid.

The defense to this claim rests entirely upon a palpable misconstruction of the statute by the accounting officers of the Treasury, which it is now insisted that this court must sustain. This theory of finality of decisions of the accounting officers has been repeatedly repudiated by this court.

The judgment of the Court of Claims should be affirmed.

George A. King,
William B. King,
William E. Harvey,
Attorneys for Appellee.